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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re DONTE COROTHERS on Habeas Corpus.	D074508 (San Diego County Super. Ct. No. SCN040304)

ORIGINAL PROCEEDING in habeas corpus. Petition granted in part and denied in part.

Angela Bartosik, Chief Deputy Primary Public Defender and Whitney N. Antrim, Deputy Public Defender, for Petitioner.

Xavier Becerra, Attorney General and Lynne G. McGinnis, Deputy Attorney General, for Respondent.

In 1995, when he was 17 years old, Donte Corothers shot and killed a man and took his gun. The following year, a jury convicted him of first degree murder with a lying-in-wait special circumstance and the trial court sentenced him to life without the possibility of parole (LWOP), which was then the presumptive punishment under Penal

Code[1] section 190.5. Contending his sentence is unconstitutionally cruel and unusual and the trial court did not adequately consider mitigating circumstances of his youth in sentencing him, Corothers petitions for a writ of habeas corpus. He asks this court to vacate his LWOP sentence and remand the matter for resentencing, or resentence him to 26 years to life in prison on the counts for which he received his LWOP sentence. Corothers further contends that because he was improperly sentenced to LWOP, Senate Bill No. 394, effective January 1, 2018, which makes him eligible for release on parole during his 25th year of incarceration and entitles him to a youth offender parole hearing, does not cure the fundamental sentencing error.

The Attorney General responds that Corothers's claims are untimely and his state law claim procedurally barred because he could have raised it on direct appeal but did not. The Attorney General argues the claims should in any event be denied on their merits because under the new law, section 3051, subdivision (b)(4), Corothers is now eligible for a youth offender parole hearing after serving a 25-year term, and thus his claim under the Eighth Amendment is moot. He further argues Corothers's sentence is not cruel or unusual under the California Constitution. The Attorney General asks this court to deny the petition.

We agree Corothers's cruel and/or unusual punishment claims are moot by virtue of his entitlement to a youth offender parole hearing. However, under our broad authority with respect to habeas relief, we grant Corothers's petition in part so as to afford

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1 Undesignated statutory references are to the Penal Code.

him an evidentiary hearing to make a record of information relevant to that eventual youth offender parole hearing, and remand the matter with directions that the trial court conduct such a hearing. We deny Corothers's petition to the extent it asks us to vacate his sentence and remand for a full resentencing hearing.

FACTUAL AND PROCEDURAL BACKGROUND

We take some of the background facts from this court's opinion on Corothers's direct appeal. In 1995, Corothers and others agreed to kill Damon Dowell. Corothers was at the time a member of the Fruit Town Pirus criminal street gang and he felt Dowell had disrespected Corothers's girlfriend and his gang. Dowell was no longer active in gang membership. Corothers arranged for one of his friends to bring Dowell to a park, where Corothers shot Dowell twice in the back and twice in the head, then took Dowell's gun.

The trial court sentenced Corothers to LWOP, stating: "It's not an easy type of case to analyze for purpose of sentencing. It's hard to imagine placing a young man in what amounts to a cage for the rest of his life, never to walk the street as a free man again, and balancing that against the other option of 25 years to life, with enhancements. But the thing that stood out in my mind as I watched Mr. Corothers throughout this trial, in the beginning of the jury selection, all through the trial, watching in a sense hoping to see if I could see a sign of remorse, even a subtle signal that hidden under that cruel exterior, which you do have, there might be some compassion towards your friend. The fact that you did take the life of a friend at or near a time of year which is set aside for compassion to other people, around Christmas, I believe it was the day after Christmas,

for the flimsiest of reasons, at least as was given, leaves the court with the feeling that you represent a very dangerous individual, one that, given the opportunity, would kill again without an awful lot of thought or provocation."

On appeal, this court directed the trial court to stay under section 654 Corothers's sentence on his robbery conviction but affirmed the judgment otherwise. (*People v. Corothers* (Jul. 17, 1998, D027946) [nonpub. opn.].) In that appeal, Corothers had argued the court abused its discretion by imposing an LWOP sentence because it relied on an inappropriate factor in imposing the aggravated sentence, and failed to consider valid mitigating factors. This court rejected the arguments, explaining that under section 190.5, LWOP was the presumptive punishment for a 16- or 17-year-old defendant convicted of first degree murder with special circumstances, unless the court found good reason to choose a less severe sentence. We pointed out the trial court was not required to cite an aggravating factor as the basis for its sentencing determination, and in imposing the sentence it had considered Corothers's young age and a probation report as well as a statement in mitigation identifying Corothers's age, insignificant prison record, and the absence of a record of violence.

In 2012, the U.S. Supreme Court decided *Miller v. Alabama* (2012) 567 U.S. 460 (*Miller*), and held the mandatory imposition of an LWOP sentence on a juvenile violated the Eighth Amendment's prohibition on cruel and unusual punishment absent consideration of the juvenile's "diminished culpability and heightened capacity for change . . . ." (*Id.* at pp. 465, 477-479.) The court did not foreclose the sentencing court's ability to impose an LWOP sentence for " 'the rare juvenile offender whose crime reflects

irreparable corruption.' " (*Id*. at pp. 479-480; see also *Montgomery v. Louisiana* (2016) 577 U.S. ___ [136 S.Ct. 718, 734] (*Montgomery*) ["*Miller* . . . bar[red] life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility"].)

Because of *Miller* and other cases (*Graham v. Florida* (2010) 560 U.S. 48 and *People v. Caballero* (2012) 55 Cal.4th 262),[2] The California Legislature enacted Senate Bill No. 260 (2013-2014 Reg. Sess.) effective January 1, 2014, which granted a juvenile under 18 years of age a "youth offender parole hearing" during the 15th, 20th, or 25th year of his or her incarceration depending on the "controlling offense." (§ 3051, subds. (a), (b).) The section required the parole board in the youth offender parole hearing to give the defendant a "meaningful opportunity to obtain release," at which the board "shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§§ 3051, subds. (d), (e), 4801, subd.

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2 The court in *Graham* held the Eighth Amendment prohibited an LWOP sentence for a juvenile who had committed a nonhomicide offense. (*Graham v. Florida*, *supra*, 560 U.S. at pp. 52, 79-82.) In *Caballero*, the California Supreme Court extended *Graham* to a juvenile's nonhomicide sentence of 110 years to life, which was the "functional equivalent" of LWOP. (*People v. Caballero, supra*, 55 Cal.4th at pp. 267-268.) The *Caballero* court "urge[d] the Legislature to enact legislation establishing a parole eligibility mechanism that provides a defendant serving a de facto life sentence without possibility of parole for nonhomicide crimes that he or she committed as a juvenile with the opportunity to obtain release on a showing of rehabilitation and maturity." (*Caballero*, at p. 269, fn. 5.)

(c).) The law, however, excluded juveniles sentenced to LWOP. (§ 3051, former subd. (h).)

In May 2014, the California Supreme Court in *People v. Gutierrez* (2014) 58 Cal.4th 1354 construed *Miller* to require that, before imposing a discretionary LWOP sentence on a juvenile, a trial court must consider (1) the defendant's " 'chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences' "; (2) the defendant's " 'family and home environment' " and attendant " 'environmental vulnerabilities' " including childhood abuse or neglect, familial drug or alcohol abuse, lack of adequate parenting or education, prior exposure to violence, and susceptibility to psychological damage or emotional disturbance; (3) the circumstances of the homicide offense, including the extent of the juvenile's involvement and indications of peer pressure; (4) whether the offender's "incompetencies associated with youth" potentially resulted in conviction of a greater offense; and (5) information bearing on the possibility of the juvenile's rehabilitation. (*People v. Gutierrez*, at pp. 1388-1389.) *Gutierrez* held in part that section 190.5 could not be construed to establish a presumption in favor of LWOP for 16- or 17-year-old juveniles without raising serious concerns under *Miller*, disapproving the contrary conclusion reached in *People v. Guinn* (1994) 28 Cal.App.4th 1130. (*Gutierrez*, 58 Cal.4th at pp. 1379, 1387.)

On January 25, 2016, the United States Supreme Court in *Montgomery* held that *Miller* must be given retroactive application as it had announced a new "substantive rule of constitutional law." (*Montgomery, supra*, 577 U.S. at p. ___ [136 S.Ct. at pp. 734,

736].) The court also explained that "[g]iving *Miller* retroactive effect . . . does not require States to relitigate sentences, let alone convictions, in every case where a juvenile offender received mandatory life without parole. A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them. [Citation.] Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment." (*Id.* at p. ___ [136 S.Ct. at p. 736].)

On January 27, 2016, two days after the court decided *Montgomery*, Corothers petitioned for a writ of habeas corpus in the superior court, arguing his sentence constituted cruel and/or unusual punishment under the federal and state Constitutions, and that he was entitled to resentencing in accordance with *People v. Gutierrez*, *supra*, 58 Cal.4th 1354 and *Miller*, *supra*, 567 U.S. 460. He argued his claims under *Miller* were cognizable on habeas corpus. He asked the court to vacate his sentence and remand for a resentencing hearing at which the court would consider the factors set forth in *Miller* and resentence him to a term of 25 years to life on the count for which he received LWOP.

Several months later, the California Supreme Court in *People v. Franklin* (2016) 63 Cal.4th 261 held that the recently enacted sections 3051 and 4801 mooted a defendant's constitutional challenge to his 50-year-to-life homicide sentence. (*Id*. at p. 268.) The court reasoned that the new law "means that [the defendant] is now serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration. Such a sentence is neither LWOP nor its functional equivalent. Because

[the defendant] is not serving an LWOP sentence or its functional equivalent, no *Miller* claim arises here." (*Id.* at pp. 279-280; see also *In re Kirchner* (2017) 2 Cal.5th 1040, 1049, fn. 4 [characterizing *Franklin* as holding "that an inmate eligible for a youth offender parole hearing is not serving the 'functional equivalent' of life without parole, meaning that his or her sentence does not implicate *Miller* and its strictures"].) *Franklin* observed the Legislature effected the change without requiring any additional resentencing procedures. (*Franklin*, at p. 279.) This conclusion led to the court's determination that the defendant's claims were moot; further, the record did not show the Legislature's mandate for a meaningful opportunity to obtain release in a youth offender parole hearing was "unachievable in practice." (*Id*. at p. 286.) Because the defendant was sentenced before *Miller* and the new law's enactment and it was not clear whether the defendant had an opportunity at his sentencing to present the kind of information relevant at a youth offender parole hearing under sections 3051 and 4801, the court in *Franklin* remanded the case to permit the trial court to determine whether the defendant was afforded sufficient opportunity to make a record of his youth-related factors at his sentencing hearing.[3] (*Id*. at p. 269.) Under *Franklin*, "[s]o long as juvenile offenders

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3 *Franklin* continued: "If the trial court determines that [the defendant] did not have sufficient opportunity, then the court may receive submissions and, if appropriate, testimony pursuant to procedures set forth in [Penal Code] section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. [The defendant] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors. The goal of any such proceeding is to provide an opportunity for the

have an adequate opportunity to make a record of factors, including youth-related factors, relevant to the eventual parole determination" the "broad directives set forth by [the youth offender parole hearing statutes]" are adequate "to ensure that juvenile offenders have a realistic and meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Ibid*.; *People v. Rodriguez* (2017) 4 Cal.5th 1123, 1132.)

On January 1, 2018, Senate Bill No. 394 went into effect. (Stats. 2017, ch. 684, § 1.5, p. 5123.) The statute amended section 3051 so as to provide that "[a] person who was convicted of a[n] . . . offense that was committed before the person had attained 18 years of age and for which the sentence is life without the possibility of parole shall be eligible for release on parole by the [Board of Parole Hearings] during his or her 25th year of incarceration . . . . " (§ 3051, subd. (b)(4).)

In May 2018, the superior court denied Corothers's request for habeas relief, finding Corothers was eligible for parole.[4]

In August 2018, Corothers filed the present habeas petition, repeating the claims from his superior court habeas petition. The Attorney General filed an informal response,

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parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors [citation] in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law.' " (*People v. Franklin*, *supra*, 63 Cal.4th at p. 284.)

4 Corothers does not explain the delay in the superior court's ruling on his petition. Nothing in the record accounts for the delay.

and Corothers replied. This court issued an order to show cause, deemed the informal response and reply the return and traverse, and deemed oral argument waived.

DISCUSSION

I. *Timeliness of Habeas Petition*

The Attorney General contends Corothers's petition is untimely under the principles of *In re Reno* (2012) 55 Cal.4th 428, citing a five and a half-year delay between the 2012 *Miller* decision and Corothers's superior court petition. Though Corothers's superior court habeas petition is file stamped January 27, 2016, the Attorney General suggests the petition was filed in January 2018.

"A criminal defendant mounting a collateral attack on a final judgment of conviction must do so in a timely manner." (*In re Reno*, *supra*, 55 Cal.4th at p. 459.) To assess whether a petition for writ of habeas corpus is timely, we look to whether the petitioner presented it without substantial delay. (*Id*. at p. 460.) If the claim is made after a substantial delay, we will consider it on its merits where the petitioner demonstrates good cause for the delay. (*Ibid*.) Even absent good cause, a court will consider the merits of a substantially delayed claim if it falls under one of four narrow exceptions, including where the petitioner was convicted or sentenced under an invalid statute. (*Ibid*.; see *In re Sims* (2018) 27 Cal.App.5th 195, 204-205.)[5] "The petitioner has the

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[5] The other exceptions are (1) where an error of constitutional magnitude led to a trial so fundamentally unfair that absent the error no reasonable judge or jury would have convicted the petitioner; (2) the petitioner is actually innocent of the crime or crimes of which he or she was convicted; and (3) the death penalty was imposed by a sentencing authority that had such a grossly misleading profile of the petitioner before it that, absent

burden of establishing the absence of 'substantial delay,' which is measured from the time the petitioner or counsel knew, or reasonably should have known of the information offered in support of the claim and the legal basis for the claim." (*In re Sims*, at p. 205.)

The record before us does not reflect a substantial delay in Corothers's petition. The premise of the Attorney General's argument—that Corothers waited to seek habeas relief until over five and a half years from the time *Miller* was decided or two years from the time the court issued its opinion in *Montgomery*—is not supported by the record, which shows Corothers filed his superior court habeas petition only days after the court in *Montgomery* held *Miller* had retroactive effect upon state convictions on collateral review regardless of when a defendant's conviction became final. (*Montgomery*, *supra*, 577 U.S. ___ [136 S.Ct. at pp. 729, 734]; see *In re Kirchner*, *supra*, 2 Cal.5th at p. 1048; *In re Lopez* (2016) 246 Cal.App.4th 350, 354 [*Montgomery* held that *Miller* applies retroactively to state convictions on collateral review].) Absent substantial delay, we need not proceed to analyze good cause or whether any exception applies. Corothers's petition is timely.

II. *Procedural Bar*

The Attorney General contends Corothers's state constitutional claim is procedurally barred because he did not raise it in his direct appeal. This has become known as a "*Dixon* bar." (*Johnson v. Lee* (2016) ___U.S. ___ [136 S.Ct. 1802, 1804]; see *In re Dixon* (1953) 41 Cal.2d 756, 759.)

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the trial error or omission, no reasonable judge or jury would have imposed a death sentence. (*In re Reno*, *supra*, 55 Cal.4th at p. 460.)

Under *In re Dixon*, *supra*, 41 Cal.2d 756, a defendant may not raise new claims in a petition for writ of habeas corpus if it was reasonably possible to raise those claims at trial or on appeal. (*In re Reno*, *supra*, 55 Cal.4th at p. 452; *In re Robbins* (1998) 18 Cal.4th 770, 814, fn. 34; *In re Johnson* (2016) 246 Cal.App.4th 1396, 1407, fn. 4.) There are exceptions to this rule, including when " 'there has been a change in the law affecting the petitioner.' " (See *In re Harris* (1993) 5 Cal.4th 813, 825, fn. 3, 841; *In re Robbins*, at p. 814, fn. 34 [applying *Harris* exceptions to *Dixon* rule].) Corothers contends his claim is cognizable under this exception.

If Corothers's only argument was that his sentence is cruel or unusual under *People v. Dillon* (1983) 34 Cal.3d 441, we would agree with the People that the claim is procedurally barred for his failure to raise it on direct appeal. But Corothers additionally contends that his LWOP sentence violates the state Constitution for the other reasons we address below, namely, the trial court's imposition of a presumptive LWOP sentence without considering during sentencing the mitigating attributes of youth and Corothers's individual background, which *Miller* now requires. *Miller* was part of a "sea change in penology regarding the relative culpability and rehabilitation possibilities for juvenile offenders . . . ." (*People v. Vela* (2018) 21 Cal.App.5th 1099, 1106.) For this reason, we reject the People's argument based on the procedural bar of *In re Dixon*, *supra*, 41 Cal.2d 756.

III. *Claims of Cruel and Unusual Punishment Under* Miller

Corothers contends his presumptive sentence of LWOP violates his rights under the Eighth Amendment of the federal Constitution as well as under the California

Constitution because his sentencing judge did not consider the mitigating circumstances of his youth as required by *Miller*, *supra*, 567 U.S. 460 and *People v. Gutierrez*, *supra*, 58 Cal.4th 1354. He acknowledges that section 3051 now grants him a youth offender parole hearing at the 25th year of his incarceration, but he argues this law does not "cure the fundamental defects in his sentence" under *Miller* because he was "*improperly* sentenced to LWOP . . . ." According to Corothers, reliance on the new law makes him shoulder the burden of proof and persuasion at a subsequent parole hearing, and thus the law "turns *Chapman* [*v. California* (1967) 386 U.S. 18] error on its head." He argues the new law "heightens, rather than minimizes, the risk of disproportionate punishment," resulting in error like that found in *Caldwell v. Mississippi* (1985) 472 U.S. 320 because the superior court judge "refused to consider the *Miller* factors of youth or conduct a resentencing hearing in light of the fact [he] is now eligible for an eventual [youth offender parole hearing]."[6] He also argues the new law leads to an "illusory promise of a

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6 *Caldwell* reversed a death sentence due to a prosecutor's argument that the jury should not view its verdict as the final word given appellate review. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 323.) The court explained "it is constitutionally impermissible [under the Eighth Amendment] to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." (*Caldwell*, at pp. 328-329; see also *People v. Thompson* (2016) 1 Cal.5th 1043, 1127.) In *Thompson*, the California Supreme Court pointed out that "later high court cases have suggested that *Caldwell* should not be given an expansive reading: '*Caldwell* simply requires that the jury not be mis[led] into believing that the responsibility for the sentencing decision lies elsewhere.' " (*Thompson*, at pp. 1127-1128.) We decline to extend *Caldwell*'s principles to circumstances where section 3051 entitles a juvenile offender to a youth offender parole hearing.

meaningful opportunity for release" akin to the presumption in *People v. Guinn*, *supra*, 28 Cal.App.4th 1130, found faulty by the *Gutierrez* court. (*Gutierrez*, 58 Cal.4th at pp. 1379, 1387.) In his petition, Corothers prays that this court vacate his LWOP sentence and remand the matter for resentencing, or resentence him to 26 years to life in prison on the counts for which he received his LWOP sentence.

The Attorney General does not contest the merits of Corothers's Eighth Amendment claim. He responds that Corothers's claims are moot because of his parole eligibility and are properly rejected under *People v. Franklin*, *supra*, 63 Cal.4th 261. Though the court in *Franklin* held the defendant was entitled to a limited remand to make a record of information relevant to his eventual youth offender parole hearing, the Attorney General asserts the availability of that relief is of no import here because Corothers does not cite *Franklin* or request a hearing for that purpose, but limits his request to a full resentencing.

We agree the Eighth Amendment claim is moot, as is any claim under the California Constitution based on the same grounds. (See *People v. Phung* (2018) 25 Cal.App.5th 741, 755-756 [holding defendant's claims of excessive punishment under federal and state constitutions moot under *Franklin*]; *People v. Cornejo* (2016) 3 Cal.App.5th 36, 68.)[7] An issue is moot when, without fault of the opposing party, an

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[7] If it were not procedurally barred, we would reject any claim of cruel or unusual punishment under the California Constitution and *People v. Dillon*, *supra*, 34 Cal.3d 441, because a lengthy term of life with the possibility of parole after 25 years for first degree murder with special circumstances is not " 'so disproportionate to the crime for which it

event occurs that renders it impossible for this court to grant a prevailing defendant any effectual relief. (See *People v. DeLeon* (2017) 3 Cal.5th 640, 645.)

Section 3051 now caps the number of years that Corothers may be imprisoned before becoming eligible for release on parole. (*People v. Franklin*, *supra*, 63 Cal.4th at p. 278.) The law's "explicit and specific purpose is 'to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in [*People v. Caballero*, *supra*, 55 Cal.4th 262] and the decisions of the United States Supreme Court in *Graham* . . . and *Miller* . . . . It is the intent of the Legislature to create a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established.' [Citation.] . . . [T]he statute expressly mandates consideration of youth-related factors in youth offender parole hearings. [Citation.] For this reason, and because the statutes contemplate that 'juvenile offenders [must] have an adequate opportunity to make a record of factors, including youth-related factors, relevant to the eventual parole determination,' . . . a juvenile offender eligible for such a hearing has a meaningful opportunity for release within the meaning of *Graham*." (*People v. Contreras* (2018) 4 Cal.5th 349, 376-377.)

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is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' " (*Id*. at p. 478; see also *People v. Boyce* (2014) 59 Cal.4th 672, 718-719; *People v. Garcia* (2017) 7 Cal.App.5th 941, 951-954 [upholding 32-year-to-life sentence for 15-year-old defendant's attempted murder conviction].)

Because the law entitles him to a youth offender parole hearing that includes a meaningful opportunity for release during his 25th year of incarceration, under *Franklin* and *Montgomery,* Corothers's sentence is "superseded" (*People v. Franklin*, *supra*, 63 Cal.4th at p. 277) and can no longer be characterized as life *without* the possibility of parole. (*In re Kirchner*, *supra*, 2 Cal.5th at p. 1049, fn. 4.) Any *Miller* violation is remedied without the need for resentencing. (*Franklin*, at pp. 279-280; *Montgomery*, *supra,* 577 U.S. ____ [136 S.Ct. at p. 736] [state may remedy a *Miller* violation by permitting a juvenile homicide offender to be considered for parole rather than by resentencing them]; see also *People v. Lozano* (2017) 16 Cal.App.5th 1286, 1291 [rejecting defendant's claim that the only remedy for an asserted Eighth Amendment violation is resentencing her to no more than 26 years to life for her conviction; *Montgomery* permits the states to remedy the *Miller* violation by providing meaningful parole consideration rather than resentencing], review granted Feb. 21, 2018, S246013, dism. as moot Aug. 29, 2018.)

Corothers cites no supporting legal authority for his assertion that section 3051 fails to cure the defects in his sentence, which he characterizes as an "improper" LWOP sentence. Apart from his forfeiture of that point (*People v. Aguayo* (2018) 26 Cal.App.5th 714, 726), we agree with the Attorney General the claim lacks merit. At the time the trial court sentenced Corothers in 1997, his LWOP sentence was authorized by section 190.5. But as of the filing of Corothers's petition, his sentence is no longer life *without* the possibility of parole. Senate Bill No. 394 cured the constitutional defects in his sentence when it became effective on January 1, 2018.

In his reply, Corothers maintains the matter is not moot for several reasons. He first argues that "principles of fundamental fairness and equal protection" demand that he be granted an opportunity to present the *Miller* factors of youth in an evidentiary hearing. More specifically, he asserts other juveniles have had their sentences vacated after "evidentiary[-]based resentencing hearings" and because he is similarly situated he should have the same treatment. It is unclear whether Corothers asks this court to remand for an evidentiary hearing to make a record of *Miller* information that is different from or independent of a resentencing hearing. (See *People v. Franklin*, *supra*, 63 Cal.4th at p. 284.) But we conclude he is entitled to such a remand to supplement the record with information relevant to his eventual youth offender parole hearing, so as to provide the required "meaningful" parole consideration under section 3041, subdivision (e). (*Franklin*, at p. 283; see *People v. Rodriguez*, *supra*, 4 Cal.5th at p. 1131.) Corothers was sentenced well before the enactment of laws creating youth offender parole hearings, and "[a]lthough a defendant sentenced before the enactment of [such laws] could have introduced such [mitigating evidence of youth] through existing sentencing procedures, he or she would not have had reason to know that the subsequently enacted legislation would make such evidence particularly relevant in the parole process. Without such notice, any opportunity to introduce evidence of youth-related factors is not adequate in light of the purposes of [the laws designed to ensure juvenile offenders will have a meaningful opportunity for release no more than 25 years into their incarceration]." (*People v. Rodriguez*, at p. 1131; compare *People v. Cornejo*, *supra*, 3 Cal.App.5th at

pp. 68-69 [defendants sentenced after *Miller* were afforded sufficient opportunity to make a record regarding their characteristics and circumstances for purposes of their youth offender parole hearing, thus no *Franklin* limited remand was required].) *Franklin* and other California Supreme Court decisions contradict Corothers's assertion that any meaningful opportunity to present such evidence under section 3051 is "illusory." (*Franklin*, at p. 286; *People v. Contreras*, *supra*, 4 Cal.5th at pp. 376-377.)

Corothers next argues the matter is not moot because his presumptive LWOP sentence impacts his placement in the prison system, his opportunity to earn credits, and his access to rehabilitative programming in prison available to those serving a life sentence with the possibility of parole. Because Corothers's sentence is no longer effectively LWOP, we question the premise of these assertions. But he has not met his "heavy burden" to prove these facts by a preponderance of the evidence in any event. (*In re Manriquez* (2018) 5 Cal.5th 785, 796-797 [habeas petitioner " ' "bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them." [Citation.] To obtain relief, the petitioner must prove by a preponderance of the evidence the facts that establish entitlement to relief' "]; *In re Bell* (2017) 2 Cal.5th 1300, 1305.) The sole support for Corothers's assertions is an unauthenticated "Prison Law Office" memo attached as an exhibit to his petition. Even assuming we could take judicial notice of that document, we would not judicially notice the truth of its contents. (See, e.g., *People v. Hernandez* (2011) 51 Cal.4th 733, 741, fn. 3 [improper to judicially notice of contents of declarations submitted with habeas petition]; *People v. Sledge* (2017) 7 Cal.App.5th

1089, 1096 [judicial notice establishes existence and content of probation report, not the truth of factual statements contained therein].)

Corothers also argues his LWOP sentence impacts the lens through which he will be viewed by the parole board and Governor during any parole evaluation. According to Corothers, "he will appear at his youth offender parole hearing . . . under the shadow of the sentencing court's judgment that he is irreparably corrupt and permanently incorrigible. He would be thrust into that hearing thoroughly unprepared [and] . . . [l]eaving in place the unconstitutional LWOP sentence that was previously imposed compounds the stigma." The sentencing court in this case, though it found Corothers to be "a very dangerous individual . . . [who] would kill again without an awful lot of thought or provocation," did not make findings of permanent or irreparable incorrigibility. Further, at the time it sentenced Corothers in 1997, the court operated under a presumption for the LWOP sentence, invalidating the premise of Corothers's arguments. The rest of his concerns are eliminated by the new law, which supersedes Corothers's LWOP sentence, and our decision that Corothers is entitled to a remand for an evidentiary hearing as set forth below. Finally, we decline to attribute any negative bias to the board or Governor. As *Franklin* explained in addressing amicus arguments, the Legislature has directed that the board in conducting a youth offender parole hearing, " 'shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.' And section 3051, subdivision (e) says: 'The youth offender parole hearing to consider release shall provide for a meaningful

opportunity to obtain release. The board shall review and, as necessary, revise existing regulations and adopt new regulations regarding determinations of suitability made pursuant to this section, subdivision (c) of Section 4801, and other related topics, consistent with relevant case law, in order to provide that meaningful opportunity for release.' " (*People v. Franklin*, *supra*, 63 Cal.4th at pp. 285-286.) Corothers has not supplied information about the Board's criteria, practices or procedures; like the court in *Franklin*, absent that information we conclude it is premature to opine on whether any such practices conform with the law. (*Id*. at p. 286.)

We acknowledge Corothers did not pray for a limited remand under *Franklin* to permit him to make a record of the sort of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing. But our authority to grant relief on his habeas petition is broad: " '[H]abeas corpus is at its core, an equitable remedy.' [Citation.] When habeas relief is warranted, our power is not limited 'to either discharging the petitioner from, or remanding him to, custody [citations], but extend[s] to disposing of him "as the justice of the case may require" . . . .' [Citations.] Therefore, in issuing a writ of habeas corpus, courts have broad discretion to formulate a remedy that is tailored to redress the particular constitutional violation that has occurred." (*People v. Booth* (2016) 3 Cal.App.5th 1284, 1312; *In re Crow* (1971) 4 Cal.3d 613, 619; § 1484.) Habeas relief is available, for example, on a separation of powers violation to secure a hearing to present evidence and argument as to why a trial court should exercise new discretionary authority to strike a prior conviction, thereby shortening the petitioner's period of incarceration. (See *People v. Cortez* (1971) 6 Cal.3d 78, 88; see also *People v.*

Buycks (2018) 5 Cal.5th 857, 895 [" 'habeas corpus proceedings may provide a vehicle to obtain relief limited to a new sentencing hearing in the original criminal action, which may result in a different sentence' "], citing in part *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 530, fn. 13.) The California Supreme Court is presently considering whether habeas relief is available in this context (*In re Cook* (2017) 7 Cal.App.5th 393, review granted Apr. 12, 2017, S240153), but in the interim, we conclude we are empowered to grant this relief and the *Franklin* limited remand remedy is appropriate here, even with the passage of time since Corothers's judgment.

DISPOSITION

The petition for writ of habeas corpus is granted in part and denied in part. We deny Corothers's request to vacate his sentence and remand for a full resentencing, but grant a remand with directions that the trial court conduct a hearing at which Corothers has the opportunity to make a record of factors, including youth-related factors, relevant to his eventual youth offender parole hearing.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.